

1
2
3
4
5
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
6
7
8

9 Armando Rodriguez,

10 Petitioner,

11 v.

12 Ryan Thornell, et al.,

13 Respondents.
14

No. CV-23-00439-PHX-ROS

ORDER

15 Petitioner Armando Rodriguez filed a petition for a writ of habeas corpus pursuant
16 to 28 U.S.C. § 2254. (Doc. 1). In 2017, Petitioner was convicted in Maricopa County
17 Superior Court of one count of child molestation and two counts of attempted child
18 molestation, and he was sentenced to 17 years in prison. Magistrate Judge Camille D.
19 Bibles recommends denial of Petitioner’s petition because it is barred by the statute of
20 limitations provision of the Antiterrorism and Effective Death Penalty Act (“AEDPA”),
21 which imposes a one-year statute of limitations on state prisoners seeking federal habeas
22 relief. Petitioner filed some objections. For the following reasons, Magistrate Judge Bibles’
23 recommendation will be adopted.

24 **I. Background**

25 Petitioner was charged with three counts of sexual conduct with a minor, three
26 counts of kidnapping, three counts of aggravated assault, three counts of attempted sexual
27 conduct with a minor, two counts of sexual abuse of a minor, two counts of child
28 molestation, and one count of furnishing obscene materials to a minor. (Doc. 9 at 1). On

1 August 31, 2017, Petitioner entered into a plea agreement, in which he pleaded guilty to
2 one count of child molestation and two counts of attempted child molestation in exchange
3 for dismissal of the other fourteen charges, and he agreed to the imposition of a 17-year
4 sentence. On November 3, 2017, Petitioner was sentenced to 17 years in prison.

5 Petitioner filed a notice of post-conviction relief on November 29, 2017, and post-
6 conviction relief counsel reviewed his record but did not find any colorable claims to raise
7 in post-conviction proceedings. (Doc. 9 at 2). Petitioner filed a *pro se* petition alleging his
8 post-conviction counsel was ineffective for failure to review Grand Jury transcripts, but in
9 May 2019, the superior court dismissed that petition. (*Id.*). Petitioner did not seek review
10 in the Arizona Court of Appeals.

11 Over two years later, on July 20, 2021, Petitioner filed a second notice of post-
12 conviction relief, alleging the judge who conducted his settlement conference had already
13 found him guilty and was in cahoots with the prosecutor. (*Id.* at 3). On February 1, 2022,
14 the court dismissed that petition as untimely and successive. Petitioner sought review in
15 the Arizona Court of Appeals, which granted review and denied relief on October 25, 2022.
16 The Arizona Supreme Court denied his petition for review on February 2, 2023.

17 **II. Habeas Petition**

18 Petitioner filed the pending petition for a writ of habeas corpus on March 13, 2023,
19 and raised four claims: (1) that he was denied due process and equal protection because the
20 State “manipulated the facts and used malicious vindictiveness,” and he never had an
21 opportunity to present his version of events; (2) that he was convicted pursuant to an illegal
22 plea agreement that “manipulated the court[’]s mind” to aggravate his sentence, in violation
23 of the Fifth Amendment; (3) that his sentence was “extremely excessive” in violation of
24 the Fifth, Eighth, and Fourteenth Amendments; and (4) that he was subject to double
25 jeopardy. (Doc. 1; *See* Doc. 6). Petitioner supplemented his petition on March 27, 2023,
26 arguing his counsel lied to him during the plea agreement discussions. (Doc. 5).

27 Respondents filed a Limited Answer to the petition, arguing the petition is untimely
28 under AEDPA and that Petitioner had failed to exhaust his state court remedies leaving his

1 claims procedurally defaulted. (Doc. 9). Respondents also argued on the merits that
 2 Petitioner waived his claims by entering a guilty plea. (*Id.* at 13-15). Petitioner filed a reply,
 3 arguing his current petition presents “newly discovered material facts,” so the
 4 “untimeliness is irrelevant.” (Doc. 10 at 2). Petitioner also disputed that he waived his
 5 grounds for relief by pleading guilty. (*Id.* at 3).

6 **III. Objections**

7 Magistrate Judge Bibles filed a Report and Recommendation (R&R) on June 8,
 8 2023, recommending the Court deny the habeas petition because of untimeliness under
 9 AEDPA. A district judge “may accept, reject, or modify, in whole or in part, the findings
 10 or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b). The district court
 11 must review de novo the portions to which an objection is made. *Id.* The district court need
 12 not, however, review the portions to which no objection is made. *See Schmidt v. Johnstone*,
 13 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003). Petitioner filed a few specific objections to
 14 portions of Magistrate Judge Bibles’ Report and Recommendation (R&R). Those
 15 objections are difficult to understand.

16 Petitioner first objects to Page 2, lines 13-17 in part, because “there are no reason[s]
 17 that aggravating factors should have been displayed into the factors of sentencing.” (Doc.
 18 12 at 2). However, the lines cited are a direct quotation from his post-conviction counsel’s
 19 report, and the cited section does not relate to sentencing factors. (*See* Doc. 9-1 at 34-36).
 20 The R&R correctly quoted from that report.

21 Petitioner next objects to Page 3, lines 1-7 and 10-21 of the R&R because “the
 22 petitioner is in fact obligated to obtain an evidentiary hearing if presentment is challenged
 23 of procedural defects.” (Doc. 12 at 2). Again, this section of the R&R quotes a different
 24 document, namely the state trial court’s dismissal of his post-conviction petition. (Doc. 9-
 25 1 at 62-67). The R&R correctly summarizes and quotes from that dismissal. Petitioner cites
 26 *State v. Amaral*, 368 P.3d 925 (Ariz. 2016), apparently for the proposition that he was
 27 entitled to an evidentiary hearing on his claims. That case addresses when evidentiary
 28 hearings are appropriate under Arizona law and has no application here. But even if that

1 case were applicable, Petitioner has not clearly identified the “newly discovered evidence”
 2 he believes establishes a “colorable claim.” *See id.* at 927.

3 Petitioner next objects to Page 4, lines 1-7 of the R&R, because “the laws clearly
 4 demonstrate that newly discovered material facts have no time restraints of when a
 5 petitioner/defendant can bring up this argument that clearly demonstrates that the petitioner
 6 is in fact guaranteed the factual findings of the opportunity to be granted a[n] evidentiary
 7 hearing.” (Doc. 12 at 3). The cited section of the R&R simply states the timeline of
 8 Petitioner’s second attempt at post-conviction relief and summarizes his arguments from
 9 that petition. (Doc. 11 at 4). And even taking the objection more broadly, it remains unclear
 10 what newly discovered evidence Petitioner is offering.

11 Lastly, Petitioner “controverts the rest of the R&R simply because the Petitioner[’]s
 12 voice has not been demonstrated and the R&R simply went with the side of the
 13 [Respondents] to remedy this case.” (Doc. 12 at 4). Having reviewed the record and
 14 Magistrate Judge Bibles’ R&R, the Court does not agree.

15 **IV. Timeliness**

16 Ultimately, the Court agrees with Magistrate Judge Bibles that Petitioner’s habeas
 17 petition is untimely under AEDPA. AEDPA’s one-year statute of limitations begins to run
 18 on “the date on which the judgment became final by conclusion of direct review or the
 19 expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). By pleading
 20 guilty, Petitioner was precluded from pursuing a direct appeal in the Arizona Court of
 21 Appeals, but he pursued an “of-right” collateral review of his conviction in state court. *See*
 22 *Summers v. Schriro*, 481 F.3d 710, 716 (9th Cir. 2007) (Arizona’s of-right post-conviction
 23 proceeding is a form of direct review under AEDPA). That action was dismissed on May
 24 7, 2019, and Petitioner did not seek review in the Arizona Court of Appeals. The window
 25 to appeal that decision expired 30 days later, on June 6, 2019. *See* Ariz. R. Crim. P.
 26 33.16(a)(1).¹ (*See also* Doc. 9 at 6-7). Thus, AEDPA’s one-year statute of limitations began

27 **1** The R&R calculates this window differently. (Doc. 11 at 6). The R&R indicates the state
 28 post-conviction petition was dismissed on May 7, 2019, the window to seek review by the
 Arizona Court of Appeals expired on July 8, 2019, and reasons that AEDPA’s one-year
 statute of limitations began to run on July 9, 2019. However, the 30-day window to seek

1 running the next day and ended on June 7, 2020.

2 The Court agrees with Magistrate Judge Bibles that the limitations period was not
3 statutorily tolled by any of Petitioner's other actions or petitions for relief, and that there is
4 no reason to consider equitable tolling or an equitable exception to the statute of limitations.
5 (*See* Doc. 11 at 6-8). Petitioner filed a second post-conviction petition on July 28, 2021,
6 over a year after his AEDPA statute of limitations had expired (and thus not tolling that
7 limitations period). The state court dismissed his petition as untimely and successive. His
8 pending federal petition was placed into the prison mailing system on March 9, 2023,
9 nearly three years after the AEDPA statute of limitations ran in his case. Petitioner has not
10 provided any basis for the Court to consider equitable tolling.

11 Accordingly,

12 **IT IS ORDERED** the Report and Recommendation (Doc. 11) is **ADOPTED AS**
13 **SET FORTH ABOVE.**

14 **IT IS FURTHER ORDERED** the Petition for Writ of Habeas Corpus (Doc. 1 and
15 supplemented by Doc. 5) is **DENIED** and **DISMISSED WITH PREJUDICE**.

16 **IT IS FURTHER ORDERED** a Certificate of Appealability is **DENIED** because
17 dismissal of the amended petition is justified by a plain procedural bar and reasonable
18 jurists would not find the procedural ruling debatable.

19 **IT IS FURTHER ORDERED** the Clerk of Court shall close this matter.

20 Dated this 6th day of July, 2023.

21
22
23
24
25
26
27

28

Honorable Roslyn O. Silver
Senior United States District Judge

review would have closed on June 6, 2019. This computational difference in the R&R does not change the outcome of the Court's analysis, as the statute of limitations had long run either way by the time Petitioner filed his habeas petition in this Court.